90-31

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

GARY W. CROSS and KAREN CROSS,

Individually and as Administrators
of the Estate of Their Minor Child,

DARREN B. CROSS

Petitioner,

v.

SHELL OIL COMPANY

Respondent,

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

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QUESTIONS PRESENTED

I. Whether the doctrine of employment at will is based on sound codal authority and if so, do exceptions apply to an employee who was terminated for failure to go along with unethical company practices?

II. Is a person defamed when a company representative communicates derogatory statements about a person's work performance to a separate company and to others who do not have a corresponding interest in the information?

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Statutes

Louisiana Civil Code Articles:
164, 167, 1926, 1986, 2669,
2670, 2746, 2747, 2748, 2749,
2750, and 3205 .....

Title 28 U.S.C. Section 1291.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner Gary W. Cross and Karen Cross, individually and as administrators of the estate of their minor child, Darren B. Cross, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on March 17, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit has not been reported, and is reprinted in the Appendix hereto. The opinion ("order") of the U.S. District Court has not been reported, and is reprinted in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on March 17, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

STATUTES

The Louisiana Civil Code

La. C.C. Art. 164

La. C.C. Art. 167

La. C.C. Art. 1926

La. C.C. Art. 1986

La. C.C. Art. 2669

La. C.C. Art. 2670

La. C.C. Art. 2746

La. C.C. Art. 2747

La. C.C. Art. 2748

La. C.C. Art. 2749

La. C.C. Art. 2750

La. C.C. Art. 3205

28 U.S.C. Sec. 1291

STATEMENT OF THE CASE

A. STATEMENT OF FACTS

Gary Cross went to work for Shell Oil in January 1980. He worked for Shell for seven years and had an excellent work record until he was forced to resign under protest in December 1986. At the time he was hired, Mr. Cross made Shell fully aware of the unique circumstances and complications that he, as a parent of a child with hemophilia, would be faced with during his employ. With this knowledge, Mr. Cross was hired by Shell Oil. Gary Cross was a Senior Material Control Assistant for appellee.

Throughout Mr. Cross' employment with appellee, he discovered many discrepancies in inventory calculations and contract bid procedures which occurred at several of appellee's plant sites in Louisiana. (R. p.85). After reporting such discrepancies to management personnel, Mr. Cross was

asked to go along with the improper procedures and to disregard the inconsistencies. (R. p.85, 86, 87). Mr. Cross refused to participate in the improper activities, which were clearly against the best interests of Shell Oil, and which he felt could possibly lead to personal liability if he consented to such activities. (R. p.6). After revealing his knowledge of the activities at the Shell plants, he was asked to transfer to another Shell plant either in Mississippi or Texas. (R. p.6).

Mr. Cross informed his supervisors that he could not relocate due to the special requirements of caring for his son which prevented him from leaving the Geismar, Louisiana area. His objection was based on the fact that the administration and faculty of his son's school had guaranteed Mr. Cross' son an education irrespective of the fact that Darren Cross had been exposed to Acquired Immune

Deficiency Syndrome (AIDS) virus during blood treatments. (R. p. 7, 61).

Mr. Cross made repeated requests to stay at the Geismar facility but he was transferred to another Shell plant in White Castle, Louisiana. Mr. Cross was further informed that this was only temporary and that he was to be transferred to another plant in either Texas or Mississippi. (R. p. 8).

After sixteen days at the White Castle facility, Mr. Cross became the subject of a report prepared by the Employee Relations Representative, Ann Musser who consulted with Mr. Cross' boss, G. B. Harper. The report cited Mr. Cross' work performance at the White Castle facility as unsatisfactory. (R. p. 44). Mr. Harper had earlier described Gary Cross as an "excellent employee" to Mr. Harry Duhe.

In lieu of his transfer out of the Geismar area and negative performance

report, Mr. Cross resigned under protest from Shell Oil and instigated this action.

B. SUMMARY OF THE ARGUMENT

Employment at will is an antiquated doctrine not soundly based on codal authority. The Louisiana Supreme Court's most recent decision in Brannan v. Wyeth discussed evidence for the largest portion of the decision, and then cursorily cited the usual code articles and cases of the 1930s and 1950s to support the doctrine.

The root article for employment at will is L.C.C. 2747. This article appears in Book III of the Civil Code, "Of the Different Modes of Acquiring the Ownership of Things." Clearly employment relations do not involve anyone's ownership, and thus the labor relations area of the Code needs revision.

If this Honorable Court believes that the Brannan decision adequately upholds the

doctrine of employment at will, then exceptions apply to the doctrine in the Cross case.

The first exception to employment at-will is estoppel in pais or equitable estoppel. The court in Thebner v. Xerox Corporation identified the three elements which must be established for the plea of estoppel to be satisfied: (1) representation by action or word, (2) justifiable reliance on the representation, (3) a detrimental change in one's position because of that reliance. Mr. Cross has clearly met Thebner's requirements.

Another exception to employment at-will is dismissal in bad faith or without just cause. Shell Oil forced Mr. Cross to resign because he would not go along with unethical company procedures. These activities by appellee meet the requirements for the bad faith exception.

A final exception to the doctrine of employment at will is the public policy exception. This is applied when an employee is fired for "blowing the whistle" on his employer for conduct that is unethical. Because Mr. Cross was transferred for reporting conduct that is against public policy, this exception should be applied to his case.

Mr. Cross was defamed by employee's of Shell Oil. Derogatory statements concerning appellant's work performance was communicated to a company other than the one Mr. Cross worked for and to persons who had no interest or duty in that kind of information. Because this information was communicated to persons who had no interest or duty concerning Mr. Cross' work performance, appelleees defense of qualified privilege is not applicable. Thus, Shell Oil should be liable for defaming Gary Cross.

C. PROCEEDINGS IN LOWER COURT

Appellant, Gary Cross, was employed by appellee for seven years before he was forced to resign under protest. He brought an action for breach of his employment contract and defamation in the United States Federal District Court, Middle District of Louisiana. In a minute entry dated April 8, 1988, Judge J. Polozola, District Judge of the Middle District of Louisiana, expressed that the Court believed that the matter could best be resolved on a motion for Summary Judgment. Judge Polozola then granted such a judgment in favor of appellee. An appeal was take from that judgment to the Fifth Circuit Court of Appeals (included in index). In a decision entered March 17, 1989. The Fifth Circuit affirmed the Lower Courts Decision.

ARGUMENT

I. THE DOCTRINE OF EMPLOYMENT AT WILL

A. RECENT DECISION

Defendant's cite the recent Louisiana Supreme Court decision in Brannan v. Wyeth Laboratories, Inc., 526 So.2d 1101 (La. 1988) for the proposition that the doctrine of employment at will is soundly based. In Brannan, the court denied the plaintiff recovery for breach of an employment contract because there was evidence of just cause for termination. The court discusses evidence for six and one-half pages of the eight pages devoted to the breach of contract issue. For one and one-half pages the court rather cursorily cites the usual code articles and cases of the 1930s and 1950s to support the antiquated, baseless and unfair doctrine of employment at will. The facts in Brannon, not doctrine, formed the basis of the court's decision. It was only as to the facts that disagreement

exists between the Supreme Court and the State Fifth Circuit. The former's only limitation to oral contracts of employment, is that of L.C.C. article 167's ten year term. Such a limitation has no application to Gary Cross who had worked for Shell Oil for seven years.

B. HISTORY OF EMPLOYMENT AT-WILL

The doctrine of employment at-will is not based on sound authority. L.C.C. article 2747, the root article for the doctrine in Louisiana states:

> A man is at liberty to dismiss a hired servant attached to his person or family without assigning any reason for so doing. The servant is also free to depart without assigning any cause.

L.C.C. 2747 appears in Book III of the Civil Code entitled "Of the Different Modes of Acquiring Ownership of Things." Such modes are sale (Title VII) and exchange.

Clearly employment relations do not involve anyone's ownership.

L.C.C. 2747 also appears in Civil Code's Title IX. "Of Lease. Yet "to the contract of lease, as to that of sale, three things are absolutely necessary, to wit: the thing, the price and the consent." L.C.C. 2670. Clearly lease relates to the rental of a movable or immovable, neither of which are employees. Thus L.C.C. 2747 does not provide "the law pertinent to employees who are hired without an employment contract."

The Louisiana State Law Institute agrees that changes in "Of the Letting Out of Labor and Industry" are necessary. According to its present staff only budgetary restrictions have delayed project completion. In its report on "Civil Code Revision" the Insititute states:

> 6. Book III, Title IX, Leases. It has become apparent that the work on Leases should await the

> completion of the revision of the provisions relating to Sales and to that end the further consideration of this topic has been deferred until the revision of Sales has been completed. At that time Professor Litvinoff, with Professor Palmer as associate Reporter, will do the work necessary to refine and complete the substantial work already done on the articles relating to Lease. Biennial report, infra, at 12.

The Institute's general purposes are "to promote and encourage the clarification and simplification of the law of Louisiana and its better adaptation to present social needs; to secure the better administration of justice, and to carry on scholary legal rsearch and scientific legal work." The Twenty-Fourth Biennial Report of the Louisiana State Law Institute the Legislature of Louisiana, April, 1986, p. 1. Among its duties are:

> 1. To consider needed improvements in both substantive and adjective law and to make recommendations concerning the same to the legislature.
> 2. To examine and study the civil law of Louisiana and the Louisiana

> jurisprudence and statutes of the state with a view of discovering defects and inequities and of recommending needed reforms.
> 4. To receive and consider suggestions from judges, justices, public officials, lawyers and the public generally as to defects and anachronisms in the law.
> 8. To recommend the repeal of obsolete articles in the Civil Code and Code of Practice and to suggest needed amendment, additions and repeals. Biennial Report, supra, at 1 and 2.

Many of the defects, anachronisms, antiquated and inequitable rules of law and obsolete articles are inthe lease area. As Reporter Mack E. Barham states:

> Lease as a contract is well situated in the Code after Sale and Exchange, but the title of Book III, "Of the Different Modes of Acquiring the Ownership of Things," is totally inapplicable to lease. The lessee acquires not only use and possession of the thing leased, <u>not ownership</u>. Louisiana State Law Institute, Proposed Revision of Leases, Book III, Title IX of the Louisiana Civil Code. Prepared for the Meeting of the Committee, January 28, 1978, Monteleone Hotel, New Orleans, Louisiana, Mack E. Barham, Reporter, p. 2. Refered to, infra, as <u>Barham</u>.

During the Barham study, it was suggested that the present provision on Lease of Labor be treated separately from those on Lease of Things . . ." (Barham, supra, at 2) and it was determiend:

> Several of the articles in Chapter 1 were obviously geared only toward the Lease of Things. For example, note the text of Article 2671, C.C. 1870:
>
> The price should be certain and determinant, and should consist of money. However, it may consist of a certain quantity of commodities, or even in a portion of the fruits yielded by the thing leased (emphasis added). The emphasized language can have no application to a lease of labor. Barham, supra, at 2.

Barham emphasized that:

> Of the civil codes studied, only the older ones deriving directly from the Code Napoleon classify employment contracts as leases: France, Louisiana, Belgium, and Spain. Those modern codes which have been completely revised within this century all give employment an independent status: Germany, Italy, Greece, Japan, Ethiopia, Quebec, and the USSR. Barham, supra, at 2, 3.

Barham quotes:

> The committee organized for the Quebec Civil Code Revision: . . . . . The Chapter on the contract of employment is henceforth severed from the civilian trilogy embraced in the generic term "Lease and Hire of Work"; in the contract, furthermore, is now seen as an institution distinct from the lease and hire of things, - the analogy set out in the last century no longer corresponds in any way to the modern concept of employment. Committee on the Contract of Employment, Report on the Contract of Employment (Montreal 1969) emphasis added (Barham)). Barham, supra, at 3.

Barham concluded:

> Since Lease and Contracts of employment are loosely related, that is, both are "Special Contracts," it was decided that they might logically be placed in the same general area of the code. Beyond this, however, the similarity should end: each contract should be independent of each other. Barham, supra, at 3.

Another pertinent analogy regards the price requirement.

Barham, at p. 17, states:

> The rent is sufficiently certain, however, if it can be readily ascertained by calculation from

> other factors or circumstances not within the power or control of either of the parties. See e.g., Arata v. Louisiana Stadium and Exposition District, 233 So.2d 361 (1969) at 366, and cases cited therein. In this case the Court held that where the State was to pay to the stadium and exposition district the total amount which the State had to pay to satisfy the claims of bondholders, less the sum of the hotel occupancy tax plus the net amount realized from operation of the facilities, such as an amount readily determinable by calculation, therefore a "fixed" price. Note also that it is not necessary that the rent be fixed at a stated amount of money per week, month, or year - in the lease of a service station a price of one cent per gallon of all gasoline delivered during a certain month was held to be a fixed price with sufficient certainty to support a contract of lease. See Lee v. Pearson, 143 So. 516 (La. App. 1st Cir. 1932).

So, too, it is not necessary to fix the term of employment at a stated amount. Employees rightly expect to hold their jobs as long as the business continues and they do their jobs as long as the business continues and they do their jobs properly. Employers, likewise, can expect to retain

employees so long as their wages and benefits remain competitive and they treat their employees decently. That is all the certainty the law and common sense requires.

Defendants emphasize the fixed term aspect of employment relations. Yet a proper treatment draws analogy from Barham:

> (b) In regard to the "certain time" requirement, early jurisprudence established the rule that a mineral lase must have a fixed or definite term. Bristo v. Christine Oil and Gas Co., 71 xo. 521 (1916). Such leases are now covered by the Mineral Code, R.S. 31:114 et seq., where the requirement that the lease have a term is expressly codified. See R.S. 31:115.
>
> In the area of residential or predial lease, however, the gap-filling provisions of Arts. and ___ (Source Arts. 2685 and 2687) operate to provide a duration where one has not been fixed by the parties. In the case of a residential lease the lease ". . . shall be considered to have been made by the month," (See Art. 2687, CC 1870). Such leases are thereby rendered valid by law despite the parties' failure to

expressly stipulate a definite term.

Textual cross references of L.C.C. 2747 are to L.C.C. 164, 1926 et seq. and 3205 et seq. L.C.C. 164 states:

> There are three kinds of free servants in this State, to wit:
>
> 1. Those who only hire out their services by the day, week, month or year, in consideration of certain wages; the rules which fix the extent and limits of those contracts are established in the title: Of Letting and Hiring.
> 2. Those who engage to serve for a fixed time for a certain consideration, and who are therefore considered not as having hired out but as having sold their services.
> 3. Apprentices, that is, those who engage to serve any one, in order to learn some art, trade, or profession.

L.C.C. 1986 states:

> Upon an obligor's failure to perform an obligation to deliver a thing, or not to do an act or execute an instrument, the court shall grant specific performance plus damages for delay if the obligee so demands. If specific performance is impracticable the court may allow damages to the obligee. . . .

L.C.C. 3205 states:

> Servants or domestics are those who receive wages, and stay in the house of the person paying and employing them for his service or that of his family; such as valets, footmen, cooks, butlers, and others who reside in the house.

A proper reading in Article 164 is that the "fixed time" of number 2 pertains to those "having sold their services," and does not belong in the section on lease. Number 3 addresses the special situation of apprentices whose term consists of the time necessary to learn the given trade. Number 1, on the other hand, speaks of certain wages but of no fixed term. Regarding "the rules which fix the extent and limits of those contracts," number 1 direct us to "the title: Of Letting and Hiring." An L.C.C. 2747 limits the "liberty to dismiss . . . without assigning any reason for so doing" to " . . . a hired servant attached to his person or family . . . " Clearly the redactors intended to grant the house-

hold proprietor authority to indiscriminately dismiss domestic servants "attached to his person or family." This is only natural, given the need for the master to feel completely at ease with servants who "stay in the house" (L.C.C. 3205) and are close to his family. (L.C.C. 3205). Such is not the case in the commercial or industrial workplace. For employees in such non-domestic situations, L.C.C. 1986 provides remedies of either damages or specific performance.

According to L.C.C. 2669:

> Lease or hire is a synallagmatic contract, to which consent alone is sufficient, and by which one party gives to the other the enjoyment of thing, or his labor, at a fixed price.

Yet a synallagmatic contract is:

> A bilateral or reciprocal contract, in which the parties expressly enter into mutal engagements, each binding himself to the other. Poth. Obl. no. 9. Such are the contracts of sale, hiring, etc. See State ex rel. Waterman v. J. s. Waterman and

Col;, 178 La. 340, 151 So.422, 426.

Nothing in either definition in Waterman says anything about the necessity of a "fixed term." Lease generally means "any agreement which gives rise to relationship of landlord and tenant." Black's Law Dictionary, 1035 (1968). Among the several types of leases listed there is none related to employment. Black's, supra, at 1036.

L.C.C. 2746 states "a man can only hire out his services for a certain limited time, or for the performance of a certain enterprise." The obvious implication is that, where there is no "certain limited time" or "certain enterprise," there is no "hired out." Thus every "hire out" or employment situation is certain and therefore fulfills the requirements of other code articles and judicial opinions.

L.C.C. states:

> Laborers, who hire themselves out to serve on plantations or to work in manfacturers, have not the right of leaving the person who has hired them, nor can they be sent away by the proprietor, until the time has expired during which they had agreed to serve, unless good and just causes can be assigned.

By custom of "inclusio unius est exclusio alterius," the "until the time has expired provision" does not apply to employees such as Mr. Cross, who worked neither "on plantations" or "in manufacturers." Black's, supra, at 906.

L.C.C. 2749 states:

> If, without any serious ground of complaint, a man should send away a laborer whose services had hired for a certain time, before that time has expired, he shall be bound to pay to such laborer the whole of the salaries which he would have been entitled to receive, had the full term of his services arrived.

L.C.C. 2750 states:

> But if, on the other hand, a laborer, after having hired out his services, should leave his

> employer before the time of his engagement has expired, without having just cause of complaint against his employer, the laborer shall then forfeit all the wages that may be due to him, and shall moreover be compelled to repay all the money he has received, either as due for his wages, or in advance thereof on the running year or on the time of his engagement.

The cited "History and Text of Former Codes" is enlightening.

To L.C.C. 2749:

> If, without any just ground of complaint, a master should send away a servant or laborer before the time agreed on, he shall be bound to pay said servant or laborer the whole of the salary of the Year, or period for which he has been hired, deducting the wages which the servant or laborer is likely to earn elsewhere, during that part of the time which had not expired. Projet du Gouvernement (1800), Book III, Title XIII, Art. 114.

To L.C.C. 2750:

> If the servant or laborer should leave without having any just cause of complaint against his employer, he shall be bound to pay the employer an indemnity which is based on the extra cost to the employer of obtaining another to

> perform the same services. Projet du Gouvernement (1800) Book III, Title XIII, Art. 115.

Historically the code placed a more onerous burden on the employee. He indemnified his boss for the costs of replacing him. In addition, the employer could deduct not actual wages earned but those " . . . the servant or laborer is likely to earn elsewhere . . .".

Times certainly have changed and the law needs to keep in step with those changes. Today's working man, especially those not in labor unions, cannot possibly deal on equal footing with employers. The courts, if not the legislature, must inject fairness into the process of labor-management relations.

The facts in this case are similar to those in Roussel v. James U. Blanchard & Co., Inc., 430 So.2d 247 (La. App. 4th Cir. 1983), wherein an employee was hired as a salesman by a brokerage firm trading in

precious metals for investor. All parties agree there was an oral contract confirmed by the following letter to the employee:

> Congratulations and welcome to James U. Blanchard & Company as a member of our sales staff. I know that this will be a rewarding opportunity both financially and personally.
>
> This will confirm that your compensation will be 10% of gross profit. You will also receive a $1,500 payable each 2-week period, for a 6-month period. In addition to the terms outlined, you receive a $4,000 payment up front. As an independent contractor you will be responsible for the payment of all income taxes, social security and medical benefits . . . Roussel v. James U. Blanchard & Co., Inc., supra, at 248.

The state appeals court upheld the trial court's determination that a contract of employment for a minimum term of six months existed between the parties, saying:

> In determining the term of an employment contract where none is expressed, the understanding of the parties is to be determined from their written or oral negotiations, the usages of business and, in general the nature of the employment and its

surrounding circumstances. See, Binnion v. M. & D Drugs, Inc., 8 So.2d 307 (La. App. 2nd Cir. 1942). Roussel, supra, at 249.

Binnion is very telling. Justice (then Judge) Hamiter's analysis in Binnion is most perceptive:

> Futhermore, a doctrine that has been recognized and approved in the jurisprudence of this state is, as found in 39 corpus Juris verbo Master and Servant Section 18, the following: "In the absence of custom, or of facts and circumstances showing a contrary intention on the part of the parties, it is generally held that the fact that a hiring is at so much per day, week, month, quarter, or year, raises no presumption that the hiring was for such a period, but only at the rate fixed for whatever time the party may serve, * * *."
> See Russell v. White Oil Corporation, 162 La. 9, 110 So. 70; Fletcher v. Crichton, 183 La. 551, 164 So. 411; Flournoy v. City of Shreveport, La. App., 170 So. 264.
> The evidence does not disclose the existence of a custom, and we know of none, whereby the manager or operator of a soda fountain is usually hired on a monthly basis. Neither can it be said that the nature of the business required such an employment. There is an important circumstance favoring

> plaintiff's contention, it being the fact, as before shown, that he received a monthly salary of $120. But this alone is not conclusive n determining the duration of the rlationship, for, as the trial judge points out in his written opinion, "there is considerable difference between being paid by the month and being hired for a month"; and too, it may be observed such salary was received semi-monthly rather than monthly.
>
> Another established fact exists, however, that outweighs and overcomes the mentioned favorable circumstance, and it is one which, we think, indicates the intention of the parties. In his written application of June 16, 1941, which immediately preceded the commence of his work and was the basis therefore, plaintiff stated: "I understand that if I am accepted for employment such employment may be terminated at any time without previous notice, all wages to cease at the time of such termination." Binnion, supra at 308-309.

Mr. Cross made no such statement. On the contrary, he and defendant, Shell Oil, agreed that plaintiff would be allowed to work for the defendant in the Geismar area without the threat of being relocated. Thereafter, Shell Oil, through its

management, assured plaintiff that Shell Oil shared plaintiff's concern for the best interest of his hemophiliac son. This assurance was "the intention on the part of the parties" and "conclusive in determining the duration of the relationship." As indicated in the petition and in plaintiff's affidavit, during the course of the employment relationship, defendant Shell Oil continuously respected and consented to the necessity of plaintiff having to remain in the Gesimar area. (R p. 7, 8).

C. EXCEPTIONS TO EMPLOYMENT AT WILL

If this Honorable Court believes that the Brannan decision adequately upholds employment at will, then exceptions to it apply in the Cross case. One exception is the doctrine of estoppel in pais, or equitable estoppel. In Thebner v. Xerox Corporation, 480 So.2d 454 (La. App. 3rd Cir. 1985), Louisiana jurisprudence has

recognized that estoppel in pais may be used to serve as an exception to the harsh "employment at will" doctrine. The Thebner court identified the three elements which must be established for a plea of estoppel to be satisfied: (1) a representation by action or word, (2) justifiable reliance on the representation, and (3) a detrimental change in one's position because of the reliance. Because of the facts established in the plaintiffs' petition, the plaintiffs should be allowed to rely on equitable estoppel. First, Shell, through its management personnel, represented to Mr. Cross that it was aware of the special circumstances concerning his son and that he would not be relocated because of those circumstances.

Secondly, Mr. Cross was forced to leave work on several occasions to care for the special needs of his son, Darren, because of the boy's hemophiliac condition.

Never were there complaints or reprimands by Shell because of this practice, implying consent to the agreement between Mr. Cross and Shell.

Thirdly, Mr. Cross and his family have relied to their detriment on Shell's representations as made by its management representatives. Cross was effectively forced to either accept a transfer to a location which would prohibit Mr. Cross from adequately caring for his family or to resign from Shell. As Mr. Cross can show the elements of equitable estoppel, an exception to the employee at-will doctrine has been raised, thus creating grounds for reversal of the Trial Court.

Another exception to the employee at-will doctrine is that of dismissal in bad faith or without just cause on the part of the employer. Louisiana courts have also recognized that this exception is applicable in our state. In Vioator v. City of

New Iberia 428 So.2d 1329, 1330 (La. App. 3rd cir. 1983) the court stated that "Inherent in most, if not all employment relations is the implied understanding that workers will not be discharged in bad faith or without just cause." Viator's language indicates that an employee can maintain an action for wrongful discharge against an employer who, on discharging the employee, did not have just cause for the termination;, or simply did so in bad faith. This view of bad view of bad faith as a limit on an employer's right to terminate at-will is gaining increasing acceptance in other jurisdictions as well, see Scholtes v. Signal Delivery Service, Inc., 548 F.Supp. 487 (W.D. Ark. 1982), Clotier v. Great Atlantic and Pacific Tea Co., Inc., 121 N.H. 915, 436 A.2d 1140 (N.H. 1981), Cleary v. American Air.ines, Inc., 111 Cal. App. 3df 443, 168 Cal. Rptr. 722 (Cal. App. 2 Dist. 1980).

An examination of the evidence indicates that Shell's constructive discharge of Gary Cross was in bad faith and without just cause. In the plaintiff's petition and in the affidavits of Mr. Dan Champagne, Mr. F. T. Ezell, and Mr. Harry Duhe it is shown that Mr. Cross in his seven years with Shell was a respected and highly regarded employee. Further, the "Performance Assessment Report" on pages 89-94 of the record establish that Mr. Cross' superiors believed him to be an excellent employee. Regarding the facts in Mr. Cross' affidavit, it is important to note that, after Mr. Cross' many years in the employ of Shell, a lengthy period in which Mr. Cross' loyal efforts rewarded him with a stellar work performance report and reputation, a notice of unsatisfactory performance and subsequent forced resignation arose from Mr. Cross' brief stint of approximately sixteen days at the

company's facilities in White Castle, Louisiana. The briefness of that period is magnified when considering that Mr. Cross' supervisor instructed Mr. Cross that he was also to complete various other projects at seven other Shell facilities spread throughout southern Louisiana. A good faith assessment of a veteran employee over such a short span of time is impossible.

To further support a finding of bad faith on the part of Shell, there are many unethical and improper company practices which Mr. Cross encountered during his final year with the company. This evidence shows that Shell's claim of unsatisfactory performance as a reason for discharge was merely pretextual, and that there was an underlying bad faith and no real "just cause" for Mr. Cross' termination. Since there is evidence which could show bad faith on Shell's part for dismissing Mr. Cross, and that such bad faith could create

an exception to the employment at will doctrine, the matter is inappropriate for summary judgment and, thus the trial court should be reversed.

Another exception to the employment at-will doctrine is the public policy exception. Public policy is "that principle of law which holds that no one can lawfully do that which tends to be injurious to the public or against the public good." Boyld v. Vista Eyewear, Inc., 700 W.W.2d 859 (Mo. App. 1985). It too, is an exception which has gained increasingly widespread acceptance. "The Committee Report, At Will Employment and the Problem of Unjust Dismissal," 36 Record of the Association of the Bar of the City of New York 170 (1981) recognized "public policy exception" states as California, Connecticut, Idaho, Illinois, Indiana, Kentucky, Michigan, New Hampshire, New Jersey, New York, Oregon, Pennsylvania,

West Virginia, and Wisconsin. Since that time many other states have also recognized this exception, including those which geographically surround Louisiana - Arkansas, Texas and Mississippi (see Scholtes v. Signal Delivery Services Inc., 548 F.Supp.487 (W.D. Ark. 1982), Sabine Pilot Service Inc. v. Hauck, 687 S.W. 2d 733 (Tex. 1985), Laws v. Aetna Finance Co., 667 F.Supp. 342 (N.D. Miss. 1987). Given its widespread acceptance, it seems inevitable that Louisiana will join this fold as well.

The public policy is a very sensible approach which will maintain an action for wrongful discharge if the underlying motivation for the discharge is a violation of law, contrary to the public good or contrary to a professoinal code of ethics. Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 417 A.2d 505 (N.J. 1980). The

Boyle case, supra, stated the justification for the public policy exception:

> Accordingly where an employer has discharged an at-will employee because that employee refused to violate the law or any well established and clear mandate of public policy . . . or because the employee reported to his superiors or to public authorities serious misconduct that constitutes violations of the law and of such well established and clearly mandated public policy, the employee has a cause of action in tort for damages for wrongful discharge. Boyle;, supra at 878.

Additionally, in response to this growing public policy exception, many states such as Michigan (M.C.L.A.: 15.361-15.369) and Connecticut (C.S.G.A.: 31-512, :31-278) have enacted "whistleblowers" protection statutes, to protect employees who expose wrongful business practices.

The recent Mississippi case, Laws v. Aetna Finance Co. 667 F.Supp. 342 (N.D. Miss. 1987) is enlightening, and perhaps quite applicable to the issues of the Cross case. There, the court noted the

increasing acceptance of exceptions to the "harsh and unbending" termination at-will rulse which it also labeled as "antiquity in these more enlightened times." Laws, supra at 347. This Court also recognized the many calls of commentators claiming that there must be exceptions to the rule, and citing one particular commentary. . . .

> If the state makes certain conduct illegal, it would be in the best interest of the state to encourage employees to refrain from breaking the law at the request of their employers by providing them a remedy should they be discharged for refusing to obey their employers' illegal commands. Arrot., 9 A.L.r. 4th 329, 332. (Laws, supra at 348).

Finding that there had been no pronouncement by the Mississippi Supreme Court on the recent recognition of the public policy exception, the federal court reasoned that Mississippi would recognize the public policy exception, and that in the instant case, the defendant's motion for summary judgment was inapplicable and should be

denied, with the matter properly set for trial.

Mr. Cross' affidavit at page 84 of the record is evidence of improper business practices with which he refused to cooperate. Certainly he had a reasonable fear that he could be held personally liable by involving himself in these activities. Mr. Cross could have easily believed that some were certainly illegal such as the offered bribe. Given Mr. Cross' long and successful employment record with Shell, it is certainly feasible that reasonble men could find a connection between Mr. Cross' sudden constructive discharge and his recent refusals to comply with unethical and wrongful company practices.

Employment at will is an unjust doctrine based on antiquated codal authority. It should not be cursorily cited as justification for defendant's

wrongful actions. If this Honorable Court finds the doctrine applicable, then Mr. Cross' case should fall under one of the doctrine's exceptions.

II. DEFAMATION

The defendant contends that Mr. Cross' action for defamation is based on an internal document prepared by Ann Musser which has not been communicated outside of Shell Western E&P, Inc. ("SWEPI"). The defendant's contention is erroneous. Gary Cross has personally witnessed Ann Musser's external use of the above document, as testified to in the plaintiff's affidavit. Therefore, this docuemnt was not merely for internal use. There are also strong grounds to believe that Musser communicated the document outside of SWEPI to a separate entity, Shell Chemical Company. Futhermore, Mr. Cross states in his affidavit that negative and defamatory information

was communicated by Musser to former co-workers of Mr. Cross that his presence at the company party would be unwelcomed. As all of this was shown to create anger, hurt and embarrassment for Mr. Cross, he truly has grounds for an action in defamation.

The defendant's raise the defense of qualified privilege to Mr. Cross' claim of defamation. The elements of the test of qualified privilege were recently set out in Rouly v. Enserch Corp., 835 F.2d 1127 (5th Cir. 1988). That court identified the elements as being proof that a statement made was (1) in good faith, (2) on a matter in which he had an interest or duty, (3) to another person with a corresponding interest or duty. The plaintiffs contend that facts raised by the evidence create a clear issue as to whether the defendant may raise this defense.

The first element of the test, good faith, must seriously be called into

question. The Rouly court defined good faith as "(T)he person making the statement must have reasonable grounds for believing that it is true and he must honestly believe that it is a correct statement." The defendant contends that one of the sources of defamation, the memorandum prepared by Ann Musser, is protected. In her affidavit, Ms. Musser states that she prepared the memorandum for use in a conversation between Mr. Cross and his supervisor Gerald B. Harper, and that Harper had discussed Mr. Cross' performance with her prior to preparing this memorandum. Because of the nature of the relationship between SWEPI employee relations personnel (Ms. Musser) and SWEPI management personnel (Mr. Harper), it would seem that a manager would contact an employee relations person about preparing a report on an unsatisfactory employee. Surely the employee relations personnel do

not contact each manager asking about each individual and whether a notice of unsatisfactory performance should be done for each individual. As the system requires that the manager contact employee relations, then it should be presumed that Harper contacted Musser about preparing a memorandum. As defendant's Motion for Summary Judgment contends that Musser had reasonable grounds to believe that Cross' performance was unsatisfactory, this contention overlooks whether the true source of the information, Mr. Harper, could have acted with unreasonable grounds and in bad faith.

As there is evidence which shows that Mr. Harper has characterized Mr. Cross as an excellent employee (R. p. 64), there arises a true issue as to whether Mr. Harper responded in good faith in preparing the memorandum claiming that Mr. Cross' work was unsatisfactory. Because of the

presence of the conflicting evidence, Mr. Harper's good faith cannot be presumed.

As an examination of the memorandum shows that there is no listing or acknowledgment of Ann Musser. The only name that appears as the source is that of G. B. Harper and Harper's initials, along with an unknown typist, appear at the bottom. Therefore the true test of good faith should be on Gerald B. Harper, not Ann Musser, and Harper's good faith, or lack of it, is an issue which must be determined at trial. Therefore, summary judgment was improperly granted because the defendant may lack the requisite elements for a defense of qualified privilege.

Alternatively, the Rouly court makes mention of the fact in granting qualified priveilege that the statements made were completely "within "Enserch-Pool (the company) walls." Rouly, supra, at 1130. In this case, it cannot be said that

statements concerning Mr. Cross's unsatisfactory performance were only "within company walls." In Mr. Cross' affidavit, he states that Ann Musser had informed employees of another company, Shell Chemical, that Mr. Cross' presence at a company Christmas party would not be welcome. Once again, it is important to note that Shell Western E&P, Inc. and Shell Chemical are considered separate companies by the parent company, Shell Oil. Mr. Cross was hopeful of gaining employment with Shell Chemical, but could not, and his failure to obtain employment there could be linked to Ms. Musser's spreading of the unfortunate information about him.

By contacting Shell Chemical employees, Ms. Musser abused the good faith requirement of qualified privilege, if that privilege existed at all. Furtheremore, it could be concluded by reasonable minds that her communication to those employees about

Mr. Cross' presence at the Christmas party was unnecessary and unreasonable, possibly even with reckless disregard, which could also be an abuse of any purported privilege. Robinson v. Lescrenier, 721 F.2d 1101 (7th Cir. 1983), General Motors Corporation v. Piskor, 227 Md. 165, 325 A.2d 810 (Md. 1976).

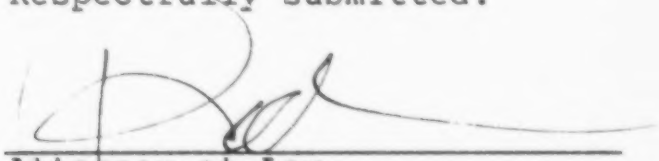
Defendant relies upon the case of O'Dell v. Deich, 496 So.2d 1074 (La. App. 4th Cir. 1986) to affirm its assertion of qualified privilege. Howver O'Dell clearly identifies the third element of establishing the defense of qualified privilege to be that "the communication must have been made to a person having a corresponding interest or duty." O'Dell, supra at 1077. It seems absurd to think that former coworkers of Cross at a company separate from Shell Western E&P, Inc. would have the same corresponding interest or duty as management officials of Shell Western E&P,

Inc. The plaintiffs therefore contend that because former coworkers of Cross who were given negative information about him by Ann Musser did not have a corresponding interest or duty as those from whome Ms. Musser was responsible to supply information to, qualified privilege cannot be asserted. Therefore, in at least two instances, the defendant has overstepped the protections granted by the defense of qualified privilege, and could therefore be found liable in the plaintiff's assertion of defamation.

CONCLUSION

For these various reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted:



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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 88-3637

GARY W. CROSS AND KAREN CROSS,
INDIVIDUALLY AND AS ADMINISTRATORS OF
THE ESTATE OF THE MINOR CHILD,
DARREN B. CROSS

APPELLANTS,

VERSUS

SHELL OIL COMPANY

APPELLEE,

APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF LOUISIANA

BRIEF ON BEHALF OF APPELLANTS

Dan M. Scheuermann
Attorney at Law
405 St. Ferdinand Street
Baton Rouge, Louisiana 70802
TEL: (504) 387-1221
Counsel for Plaintiff-Appellant

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1291.

STATEMENT OF ISSUES

Whether the doctrine of employment at will is based on sound codal authority and if so, do exceptions apply to an employee who was terminated for failure to go along with unethical company practices?

Is a person defamed when a company representative communicates derogatory statements about a person's work performance to a separate company and to others who do not have a corresponding interest in the information?

STATEMENT OF THE CASE

Appellant, Gary Cross, was employed by appellee for seven years before he was forced to resign under protest. He brought this action for breach of his employment contract and defamation.

Defendant-Appellee filed "Motion to Dismiss For Failure to State a Claim." Plaintiff-Appellant filed "Memorandum in Opposition to Defendant's Motion to Dismiss Failure to State a Claim."

In a minute entry dated April 8, 1988, Judge J. Polozola, District Judge of the Middle District of Louisiana, expressed that the court believes that the matter could best be resolved on a motion for summary judgment rather than a motion to dismiss for failure to state a claim.

Parties then filed "Motion for Summary Judgment" and "Memorandum in Opposition to Defendant's Motion for Summary Judgment." This is an appeal from a judgment of the Honorable Frank Polozola granting defendant's motion for summary judgment.

STATEMENT OF FACTS

Gary Cross went to work for Shell Oil in January 1980. He worked for Shell for seven years and had an excellent work

record until he was forced to resign under protest in December 1986. Mr. Cross was a Senior Material Control Assistant for appellee. Before his employ began, he made Shell fully aware of the unique circumstances and complications that he, as a parent of a child with hemophilia, would be faced with during his employ. (R. p. 6). With this knowledge, Mr. Cross was hired by Shell Oil.

Throughout Mr. Cross' employment with appellee, he discovered many discrepancies in inventory calculations and contract bid procedures which occurred at several of appellee's plant sites in Louisiana. (R. p.85). After reporting such discrepancies to management personnel, Mr. Cross was asked to go along with the improper procedures and to disregard the inconsistencies. (R. p.85, 86, 87). Mr. Cross refused to participate in the improper activities, which were clearly against the

best interests of Shell Oil, and which he felt could possibly lead to personal liability if he consented to such activities. (R. p.6). After revealing his knowledge of the activities at the Shell plants, he was asked to transfer to another Shell plant either in Mississippi or Texas. (R. p.6).

Mr. Cross informed his supervisors that he could not relocate due to the special requirements of caring for his son which prevented him from leaving the Geismar, Louisiana area. His objection was based on the fact that the administration and faculty of his son's school had guaranteed Mr. Cross' son an education irrespective of the fact that Darren Cross had been exposed to Acquired Immune Deficiency Syndrome (AIDS) virus during blood treatments. (R. p.7, 61).

Mr. Cross made repeated requests to stay at the Geismar facility but he was

transferred to another Shell plant in White Castle, Louisiana. He was informed that this was only temporary and that he was to be transferred to a plant in either Texas or Mississippi. (R. p.8).

After a mere sixteen days at the White Castle facility, this veteran employee was the subject of a report prepared by the Employee Relations Representative, Ann Musser. The report cited Mr. Cross' work performance at the White Castle facility as unsatisfactory. (R. p.44). The report was prepared after consultation with Mr. Cross' boss, G. B. Harper. (R. p.44). This is the same Mr. Harper who described Gary Cross as an "excellent employee" to Mr. Harry Duhe. (R. p.64).

CONCLUSION

The appellant in this case asks this Honorable Court to reverse the ruling of the District Court. Appellant asks that the court find that the doctrine of

employment at will is not supported by the Civil Code. In the event that this Honorable Court finds the doctrine of employment at will to be applicable, appellant asks that his case be found to be an exception to the doctrine.

Furthermore, appellant asks that the appellees be found to be liable to appellant for defamation. The report generated by appellees did not meet the requirements for qualified privilege as set out in Rouly and thus this defence should not be available to them.

WHEREBY, appellant respectfully requests that the ruling of the District Court be reversed.

Respectfully submitted:

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UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

GARY W. CROSS, ET AL — CIVIL ACTION

versus — NO. 88-29-B

SHELL OIL COMPANY

J U D G M E N T

For the written response assigned:

IT IS ORDERED AND ADJUDGED that judgment shall be entered in favor of the defendant(s) and against the plaintiff(s) dismissing this suit with prejudice.

Baton Rouge, Louisiana, August 18, 1988.

_____

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 88-3637
Summary Calendar

GARY W. CROSS and KAREN CROSS,
Individually and as Administrator
of the Estate of their Minor Child,
DARREN B. CROSS,

Plaintiffs-Appellants,

versus

SHELL OIL COMPANY,

Defendant-Appellee.

Appeal from the
United States District Court
for the Middle District of Louisiana
(88-29-B)

(March 17, 1989)

Before POLITZ, KING, and SMITH, Circuit Judges.

PER CURIAM:*

In this diversity jurisdiction case, Gary W. Cross appeals an adverse summary

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

judgment, essentially complaining that Louisiana's doctrine of employment-at-will should be disregarded as antiquated and unfair. As an **Erie** court, we must apply, not appraise, Louisiana's substantive law. The district court correctly did so. On the authorities cited and for the reasons given by the district court in its Ruling on Shell Oil Company's Motion for Summary Judgment rendered August 18, 1988, we AFFIRM.

GARY W. CROSS and KAREN CROSS individually and as administrator of the estate of their minor child, DARREN B. CROSS	§	NUMBER _____, DIVISION "_____"
	§	19TH JUDICIAL DISTRICT COURT
VERSUS	§	PARISH OF EAST BATON ROUGE
SHELL OIL COMPANY, INC.	§	STATE OF LOUISIANA

PETITION FOR DAMAGES

The petition of Gary W. Cross and Karen Cross, individually and as administrator of the estate of their minor child, Darren B. Cross, residents and domiciliaries of the full age of majority of the Parish of Ascension, State of Louisiana, respectfully represent that:

1.

Made defendant herein is Shell Oil Company, Inc. (hereinafter referred to as "Shell Oil"), a foreign corporation authorized to do and doing business in the State of Louisiana with its principle

Louisiana domicile being One Shell Square, New Orleans, Louisiana, having appointed C. T. Corporation Systems, 601 Poydras Street, New Orleans, as its authorized agent for service of process.

2.

The defendant, Shell Oil, is indebted unto petitioners in the full and true sum of Two Million, Seven Hundred Seventy-Seven Thousand, Thirty-Nine Dollars and No/100 ($2,777,039.00) Dollars, together with legal interest thereon from date of judicial demand until paid and for all costs of these proceedings for the following reasons, to wit:

3.

Petitioner, Gary W. Cross, had worked for defendant since on or about January 7, 1980 as Senior Material Control Assistant.

4.

Mr. Cross maintained an excellent seven-year work record with Shell Oil

before false accusations were made against him, resulting in his resignation under protest on December 10, 1986.

5.

Upon hiring Mr. Cross, Shell Oil was made fully aware that Mr. Cross was a father devoted to the care of his minor son, Darren B. Cross who suffers from hemophilia.

6.

Shell Oil was also made fully aware of the unique circumstances and complications that Mr. Cross, as a parent of a hemophiliac child, would be faced with during his employment with Shell Oil.

7.

Defendant, Shell Oil, was under no obligation to hire Mr. Cross, but even after being fully informed of the unique character of caring for a hemophiliac child and Mr. Cross' ability to do such, decided to hire him, thus establishing an implied

contract to give Mr. Cross the right to work without any impediment that would possibly be harmful to Darren B. Cross, petitioner's minor son.

8.

Throughout petitioner's employment with Shell Oil, petitioner, as Senior Material Control Assistant, discovered many discrepancies in-inventory calculations and/or contract bid procedures which occurred at several of Shell Oil's plant sites in Louisiana.

9.

After reporting such discrepancies to Shell Oil management representatives, petitioner, Gary W. Cross, was asked to go along with the improper procedure and/or disregard any inconsistencies.

10.

Petitioner refused to participate in the improper activities which were clearly against the best interests of Shell Oil and

which petitioner felt he could possibly become liable if he consented to such activities.

11.

Petitioner, after revealing his knowledge of the activities at the Shell Oil plants, was immediately asked to transfer and accept a laborer's position at a Mississippi or Texas Shell Oil Plant.

12.

In the spring of 1985, petitioner, Gary W. Cross, voiced objection to relocation with defendant, Shell Oil, due to the special requirements of caring for his son which prevented Mr. Cross from relocating out of the Geismar, Louisiana, area where petitioner worked and petitioner's son attended a special school.

13.

Petitioner's objection was based on the fact that the administration and faculty of the Most Blessed Sacrament

School, the school attended by petitioner's son, had agreed with petitioner that his son would be guaranteed an education irrespective of the fact that petitioner's son, Darren B. Cross, had been exposed to Acquired Immune Deficiency Syndrome (AIDS) virus during blood treatments and/or irrespective of any future non-communicable complications that Darren may develop in the future. This school differed from many other schools throughout the United States which had refused attendance in Darren's situation.

14.

Petitioner informed his supervisors of the facts stated in the foregoing paragraph during his employment with Shell Oil before any mention of the possible relocation of plaintiff was ever made.

15.

Defendant, Shell Oil, through its management representatives, assured

petitioner that he would not be relocated considering the special circumstances and demands on Mr. Cross which Shell Oil was made fully aware upon hiring plaintiff.

16.

After discovering the knowledge that petitioner possessed as aforementioned and of petitioner's intent to reveal such knowledge to higher Shell Oil officials, Shell Oil, through certain of its management representatives, gave no consideration to the fact that petitioner was faced with a natural concern for the safety and welfare of his hemophiliac child, but decided and did so breach its agreement with petitioner by demanding that petitioner relocate to Mississippi or Texas or suffer termination.

17.

At the time of Shell Oil's demand for petitioner's relocation, the contract between the petitioner, Gary W. Cross, and

defendant, Shell Oil, had been in effect and enforced for at least five years.

18.

On several occasions, Mr. Cross would leave work when employed by Shell Oil to care for his son, Darren, at school and no complaints or reprimands were made by the defendant on such occasions, thus implying consent to the agreement between Mr. Cross and Shell Oil.

19.

Petitioner made repeated requests to remain in the immediate area of Geismar, Louisiana, as had been promised by Shell Oil management representatives.

20.

Defendant, in response to petitioner's requests, informed petitioner that he did not have a choice and would be working four days a week away from his home in White Castle, Louisiana, and one day in Geismar. Further, defendant, Shell Oil,

through its representative Ann Musser, informed petitioner that he would never be permanently relocated back to Geismar. Ann Musser also stated that she did not accept as true petitioner's necessity of having to be near his son.

21.

Ann Musser, as well as petitioner's immediate supervisor, Gerald Harper, informed the plaintiff that the White Castle assignment was temporary and that plaintiff would be asked to transfer at a later date to Mississippi or Texas as aforementioned or be terminated if he refused to accept such transfer.

22.

Plaintiff submits that the threats made by defendant's representative were simply a pretext to force plaintiff's resignation because Shell Oil considered providing benefits for the transfer of an employee's hemophiliac child upon

relocation of the child's employee-father was a burden that it did not want to bear and that certain Shell Oil management representatives did not want petitioner to reveal his knowledge of improper activities at its plant sites.

23.

Thus, defendant, Shell Oil, through its management representatives, left the plaintiff with two alternatives: (1) Accept any transfer assignment ordered by Shell Oil and take the risk of his hemophiliac son suffering the consequences; or (2) Resign under protest and thus seek legal remedy by bringing this action.

24.

Petitioner was unable to discuss his grievances with the Shell Employee Relations Representative at White Castle, Ann Musser. Ann Musser informed petitioner that Shell Oil had hired the petitioner, not his handicapped son, and therefore

Shell Oil should not be burdened with petitioner's problem. Also, Ann Musser intentionally drafted a false letter to Shell Oil officials stating that petitioner's job performance was unsatisfactory at the White Castle Plant.

25.

Petitioner denies such allegation.

26.

Petitioner submits that his transfer back to Geismar was not possible because of Mrs. Musser's discriminatory attitude towards petitioner and her failure to process petitioner's grievances which was intentionally done to force the petitioner's resignation. Also, because Mrs. Musser's husband is the Employee Relations Manager at Shell Chemical in Geismar, petitioner, Gary W. Cross, had no one to assist his grievance at his former place of employment.

27.

Thus, Shell Oil intentionally breached its contractual agreement with petitioner, Gary W. Cross, forcing him to resign under protest.

28.

Petitioner, since the occurrence of said events, has been in a highly nervous condition and has been unable to put said events out of his mind.

29.

The false accusation and defamatory statements made by defendant, Shell Oil, through its management representative, caused the petitioner, after numerous attempts, to be unsuccessful at gaining subsequent employment from December 11, 1986 to September 9, 1987.

30.

As a result of the intentional acts of the defendant's management representatives, the petitioner and his family have together

suffered extreme mental anguish and emotional distress. As a direct result of this psychological damage, petitioner's son, in addition, has suffered trauma bleeding.

31.

In addition to the loss of income resulting from defendant's actions, petitioner, as well as his family, has suffered embarrassment and humiliation in the eyes of their family, neighbors and friends.

32.

The defendant, Shell Oil Company, Inc., is liable under the doctrine of respondeat superior for all actions as aforementioned by its management representatives and is thus indebted to the petitioners for all damages suffered.

33.

Petitioner, Gary W. Cross, individually and as administrator of the

estate of his minor child, Darren B. Cross, has suffered damages as follows:

(a)	Damages to his standing in the eyes of his family, friends and the community	$ 250,000.00
(b)	Damages because of embarrassment and mental anguish felt by petitioner and the members of his family	250,000.00
(c)	Physical pain and suffering on behalf of Darren B. Cross (past, present, and future)	250,000.00
(d)	Injury to his reputation as a competent employee	250,000.00
(e)	Mental anguish and suffering	250,000.00
(f)	Medical expenses (past, present and future)	250,000.00
(g)	Lost wages	27,039.00
		$1,527,039.00

34.

Petitioner, Karen Cross, individually and as administrator of the estate of her minor child, Darren B. Cross, has suffered damages as follows:

(a)	Damages to his standing in the eyes of his family, friends and the community	$ 250,000.00
(b)	Damages because of embarrassment and mental anguish felt by petitioner and the members of his family	250,000.00
(c)	Physical pain and suffering on behalf of Darren B. Cross (past, present, and future)	250,000.00
(d)	Injury to his reputation as a competent employee	250,000.00
(e)	Mental anguish and suffering	250,000.00
(f)	Medical expenses (past, present and future)	250,000.00
		$1,250,000.00
	TOTAL DAMAGES	$2,777,039.00

35.

Petitioner further prays for a trial by jury on all issues raised herein.

WHEREFORE, petitioners, Gary W. Cross and Karen Cross, individually and as administrators of the estate of their minor son, Darren B. Cross, pray that the

defendants be served and cited to appear and answer hereto, and after all legal delays and due proceedings had, there be judgment herein in favor of petitioners and against defendant, Shell Oil Company, Inc., in the full and true sum of Two Million, Seven Hundred Seventy-Seven Thousand, Thirty-Nine and No/100 ($2,777,039.00) Dollars, together with legal interest thereon form date of judicial demand until paid, ordering reinstatement of petitioner to his former position of employment with the defendant herein, and for all costs of these proceedings and reasonable attorneys' fees.

By Attorney

DAN M. SCHEUERMANN
405 St. Ferdinand Street
Baton Rouge, Louisiana 70802
Telephone: (504) 387-1221

STATE OF LOUISIANA

PARISH OF EAST BATON ROUGE

BEFORE ME, the undersigned Notary Public, personally came and appeared,

---------- GARY W. CROSS ----------

who, after first being duly sworn, did depose and say that:

He is the petitioner in the above and foregoing petition; he has reviewed same; and all of the allegations contained therein are true and correct to the best of his knowledge, information and belief.

_____

GARY W. CROSS

SWORN TO AND SUBSCRIBED before me, Notary Public, on this _____ day of _____, 1987.

_____

NOTARY PUBLIC

BEFORE ME, the undersigned Notary Public, personally came and appeared,

---------- KAREN CROSS ----------

who, after first being duly sworn, did depose and say that:

She is the petitioner in the above and foregoing petition; she has reviewed same; and all of the allegations contained therein are true and correct to the best of her knowledge, information and belief.

_____
KAREN CROSS

SWORN TO AND SUBSCRIBED before me, Notary Public, on this _____ day of _____, 1987.

_____
NOTARY PUBLIC

PLEASE SERVE:

SHELL OIL COMPANY, INC.
through its agent for service of process,
C. T. Corporation Systems
601 Poydras Street
New Orleans, Louisiana 70130